CREATIVE FURNISHING SDN. BHD.

v.

WONG KOI

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
[CIVIL APPEAL NO. 82/88]
15 MARCH 1989

CIVIL PROCEDURE: *Mareva injunction - Principles applicable - question of a good arguable case - Question of material misrepresentation - Question of risk of disposal of assets.*

The respondent/plaintiff sued the 1st and 2nd defendants jointly and severally for an alleged partnership debt of RM82,062.68 for materials supplied and work done. The plaintiff obtained a Mareva injunction against the appellant/1st defendant and the 1st defendant filed this application to set aside the injunction.

The 1st defendant argued that all sums due for the works were to be paid by the 2nd defendant solely and that the 1st defendant is not liable as it was not a partner of the 2nd defendant as alleged. Evidence was given to show that the 2nd defendant was to be paid sums under the main contract.

In the affidavit in support of the *ex parte* Mareva injunction, it was deposed that the 1st and 2nd defendants had a paid-up capital of RM60,000 and RM50,000 respectively. The 1st defendant however had a paid-up capital of RM300,000 and the 1st defendant contended that that part of the plaintiff's affidavit was to mislead the Court. The learned Judge dealt with this point on the basis that the same was a mere misstatement and not a material fact.

In support of the requirement of "risk of disposal of assets" the plaintiff had sought to rely on:

(i) the paid-up capital of the 1st defendant:

(ii) both the defendants had refused to settle the debt; and

(iii) a personal cheque of a director of the 2nd defendant for RM3,000 had been dishonoured because payment was stopped.

The 1st defendant's application to set aside the injunction was dismissed by the learned Judge. Hence this appeal by the 1st defendant.

Held:

[1] On the pleadings and affidavit evidence, it could not be said that the learned Judge was wrong in law or in fact in his findings that the respondent has established a good arguable claim and that the appellant had assets within jurisdiction.

[2] The disclosure of the paid-up capital of the 1st defendant was obviously to prove not only that the appellant had insufficient funds or assets to meet the respondent's claim but also that in the circumstances there was a real risk that the said paid-up capital might be dissipated or removed before judgment.

[3] The attempt to depress the paid-up capital of the appellant was not irrelevant or immaterial in an *exparte* application for a Mareva injunction. It therefore constitutes a material misrepresentation of fact in that it purported to support the existence of a risk of dissipation of assets.

[4] There must be solid evidence to establish the risk of dissipation of assets. Mere refusal to pay a disputed debt and issue the dishonoured cheque fell far too short of the necessary evidence to establish real risk of dissipation.

[5] It is incumbent on an applicant of an *exparte* Mareva injunction to make frank and full disclosures of all material facts. Every material representation must not be misleading and there must not be any suppression. Failure to do so at the crucial time of making the application would invariably be fatal.

[6] Here, the material misrepresentation was sufficiently grave to prevent the Judge from exercising his discretion in the respondent's favour.

[Appeal allowed with costs.]

Cases referred to:
Aspatra Sdn. Bhd. & 21 Ors. v. Bank Bumiputra Malaysia Berhad & Anor. [1987] CLJ (Rep) 50
KSM Credit & Leasing Sdn. Bhd. v. Data Maute (M) Sdn. Bhd. & Ors.[1986] CLJ (Rep) 414
Third Chandris Shipping Corporation & Ors. v. Unimarine [1979] 2 All ER 972

For the appellant - Darshan Singh Khaira; M/s. Darshan Singh & Co.
For the respondent - Balasundaram; M/s. Balasundaram & Co.

JUDGMENT

Mohd. Azmi SCJ:

We allowed the appeal on 9 January 1989 and now give our reasons.

The respondent (plaintiff) sued the appellant (1st defendant) jointly and severally with Classy Homes Sdn. Bhd. (2nd defendant) for an alleged partnership debt of RM82,062.68 for materials supplied and work done in respect of millworks on two floors of the Shangrila Inn, Penang, under the terms of a sub-contract. On 29 June 1987, the date of the issue of writ, the respondent obtained by way of *ex parte* summons-in-chambers a Mareva Injunction against both the defendants to restrain them until further order from disposing of or otherwise dealing with monies or assets belonging to both or either of them not exceeding RM95,000 and from disposing of or otherwise dealing with the said assets or monies due to them from the main contractor- Sumitomo Construction Co. Ltd., to the extent of RM95,000. By notice of motion dated 6 July 1987, the appellant applied to set aside the *ex parte* Mareva Injunction and other consequential orders. The motion was heard on 4 January 1988 and was eventually dismissed on 22 February. Being dissatisfied, the appellant appealed with leave against the whole of the decision of the learned Judge.

The principal issue before us was whether the discretionary power to issue the *ex parte* Mareva Injunction had been properly exercised by the learned Judge. Two grounds were canvassed on behalf of the appellant. Firstly, it was argued that the respondent's claim had nothing to do with the appellant but concerned only the Classy Homes Sdn. Bhd. (2nd defendant). In its statement of defence dated 7 July 1987, the appellant denied that the respondent was its sub-contractor or its employee. It was averred that the appellant and the 2nd defendant did jointly tender for the project at the Hotel which was required by the main contractor to be done under one parcel, but the appellant separately carried out only the

design part of the project. The appellant denied that it was at any time a partner of Classy Homes Sdn. Bhd. and therefore denied liability for the sum owed by the 2nd defendant to the respondent. It was contended that in fact the 2nd defendant still owed the appellant the sum of RM14,386.46 which the 2nd defendant had received from the main contractor. Clearly, the appellant's defence would be principally on the basis that the alleged debt due to the respondent was not a partnership debt but was incurred solely by the 2nd defendant on the ground that the appellant was never a partner of the 2nd defendant and as such it could not be held jointly and severally liable. There appeared to be no dispute to the appellant's contention that all monies payable under the sub-contract were paid by the main contractor to the 2nd defendant, and nor was there any challenge to the appellant's averment that money due to it already paid by the main contractor to the 2nd defendant had not been paid. The issue on the existence of the alleged partnership between the appellant and the 2nd defendant must of course be finally determined at the trial. But on the pleadings and affidavit evidence, it could not be said that the learned Judge was wrong in law or in fact in his findings that the respondent had established in his own words "a good arguable claim", and that the appellant had assets within jurisdiction.

Secondly, it was argued that the learned Judge erred in law and in fact in holding that there was a sufficient risk of the appellant's assets being dissipated before judgment. In the affidavit of Mr. Wong Koi sworn on 29 June 1987 in support of the *ex parte* application for Mareva Injunction, he deposed in para. 12 that:

> My solicitors have carried out a search at the Registrar of Companies on 26 June 1987 and have ascertained that the 1st defendant has only a paid-up capital of RM60,000 and the 2nd defendant has a paid-up capital of RM50,000. The results of the search made are now shown to me and exhibited hereto marked "WK8". Both companies do not appear to own any immovable properties.

It was not seriously disputed that the facts deposed in para. 12 as far as the appellant was concerned, were untrue. The disclosure of these facts in the affidavit was obviously to prove not only that the appellant had insufficient fund or assets to meet the respondent' claim but also that in the circumstances there was a real risk that the said paid-up capital might be dissipated or removed before judgment. In response to these allegations, Mr. Chew Teik Chye the managing director of the appellant in his affidavit in-reply dated 17 July 1987, deposed in para. 9 that:

> The plaintiff has misled the Court. The first defendant's paid up capital is RM300,000. A copy of the statement is enclosed herewith marked as Exhibit "C4".

The learned Judge dealt with this point on the basis that the matter complained of by the appellant was not a material fact but a mere misstatement. It was clear to us that whatever search or investigation carried out by the respondent's solicitors to ascertain financial standing of the appellant was not done thoroughly or conscientiously. We were unable to agree with the learned Judge that the attempt to depress the paid-up capital of the appellant from RM300,000 to a mere RM60,000 was not relevant or material in an *exparte* application for a Mareva Injunction. In our view, it must of necessity constitute a material misrepresentation of facts in that it purported to support the existence of a risk of the appellant's meagre assets of RM60,000 being dissipated in the face of the anticipated judgment sum of RM82,062.68.

The latest available consolidated balance sheet of the appellant as contained in Exhibit "C4" clearly showed that it had been financially sound. It had a total current asset of RM1.21 million as compared to its total current liabilities of RM870,845. The appellant's share capital was indeed RM300,000.

The only other evidence available before the learned Judge to arrive at a conclusion that there was a risk of dissipation of the appellant's assets was the fact that both the appellant and the 2nd defendant had refused to settle the debt, and also the fact that in October 1986 a director of the 2nd defendant had given the respondent a personal cheque of RM3,000 towards part payment of the debt which cheque was dishonoured not apparently because of shortage of fund but for reason of payment being stopped.

In *Aspatra Sdn. Bhd. & 21 Ors. v. Bank Bumiputra Malaysia Berhad & Anor*. [1987] CLJ (Rep) 50, this Court by a majority had referred to the importance of the relief by way of Mareva Injunction for the purpose of preserving assets and preventing a defendant from dissipating his assets within jurisdiction before judgment. But the remedy is not of unlimited application. On the facts of the appeal before us, the respondent must satisfy the Court firstly, that he had a good arguable case; secondly, that the appellant had assets within jurisdiction, and thirdly, that there was a real risk of the assets being dissipated or removed before judgment in that there must be solid evidence to establish the risk. In our opinion, mere refusal to pay a disputed debt and issuing of a dishonoured personal cheque by a director of the 2nd defendant (who was not a party in this appeal) as presented before the learned Judge, fell far too short of the necessary evidence to establish real risk of dissipation of assets of the appellant before judgment.

Further, in presenting affidavit evidence to establish the necessary ingredients for an *ex parte* order for Mareva Injunction, it is incumbent on the applicant to make frank and full disclosures of all material facts. Every material representation must not be misleading, and there must not be any suppression of material facts. Failure to do so at the crucial time of making the *exparte* application would invariably be fatal. On this particular point we approve the judgment of V.C. George J in *KSM Credit & Leasing Sdn. Bhd. v. Data Maute (M) Sdn. Bhd. & Ors.* [1986] CLJ (Rep) 414 on the applicability of the principle of frank and full disclosures, in all *ex parte* applications for Mareva Injunction.

It is of utmost importance that the remedy of Mareva Injunction should not be abused. The caution for the benefit of the solicitors for the City of London given by Lord Denning MR in the *Third Chandris Shipping Corporation & Ors. v. Unimarine* [1979] 2 All ER 972 had been quoted with approval in *Aspatra* case at p. 104, and we wish, with respect, to adopt the same caution for the benefit of the solicitors in this country.

In this appeal we were satisfied that the material misrepresentation made by the respondent was sufficiently grave to prevent the learned Judge from exercising his discretion in the respondent's favour. The remaining representations made in support of the application were manifestly inadequate for the Court to hold that there was a real risk of the appellant's assets being dissipated or removed before judgment. For these reasons we allowed the appeal with costs, and dissolved the Mareva Injunction granted on 29 June 1987 as prayed for in the appellant's notice of motion.

Also found at [1989] 2 CLJ 93